

BEFORE THE FEDERAL ELECTION COMMISSION

JAN 16 9 17 AM '98

In the Matter of

Malcolm S. "Steve" Forbes, Jr.
Forbes, Inc.
Forbes for President, Inc. and
William A. Dal Col, as treasurer

MUR 4305

SENSITIVE

GENERAL COUNSEL'S REPORT

I. BACKGROUND

On December 3, 1996, the Commission found reason to believe Malcolm S. "Steve" Forbes, Jr., Forbes Magazine ("*Forbes*") and Forbes, Inc., and Forbes for President, Inc. and its treasurer¹ ("Forbes Committee") (collectively, "Respondents"), each violated 2 U.S.C. § 441b(a).² The Commission's findings were based on in-kind corporate contributions made by Forbes, Inc. and accepted by the Forbes Committee in the form of regularly-featured columns written by Mr. Forbes and published in *Forbes*. The Commission also found that the Forbes Committee violated 2 U.S.C. § 434(b)(2)(A) by failing to report the contributions.

¹ William A. Dal Col replaced Joseph A. Cannon as treasurer on January 13, 1997. An amended Statement of Organization reflecting this change was received on January 16, 1997.

² Because Forbes Magazine is a division of Forbes, Inc. and not a separate corporate entity, the recommendations in the General Counsel's Brief and in this Report involving the magazine are confined to Forbes, Inc.

In their reply brief, Respondents continue to claim that Forbes, Inc. and the Forbes Committee were not provided with a copy of the complaint before reason to believe findings were made against them (Counsel submitted a response to the complaint only on behalf of Mr. Forbes). Complaint notifications were sent to Mr. Forbes, Forbes, Inc. and the Forbes Committee and none were returned; accordingly, it is the policy of this Office to assume that all of the letters were received and we so informed counsel for Mr. Forbes, who is now counsel for all Respondents. When notifications of the Commission's reason to believe findings were mailed out, counsel similarly claimed that Forbes, Inc. and the Forbes Committee did not receive the packages, even though none were returned and this Office is in possession of a receipt for certified mailing that appears to have been signed by a Forbes employee. In any case, a copy of the package was sent to Forbes, Inc. upon request, and all of Respondents' requests for extensions of time were granted.

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The Office of General Counsel conducted an investigation pursuant to 2 U.S.C. § 437g(a)(2)(A). On August 20, 1997, this Office transmitted a letter and brief to Respondents notifying them that this Office was prepared to recommend that the Commission find probable cause to believe that violations occurred.³ Respondents have submitted a joint reply brief. After reviewing Respondents' brief, this Office recommends that the Commission find probable cause to believe against Respondents and approve the attached joint conciliation agreement.

II. ANALYSIS⁴

As noted in the General Counsel's probable cause brief ("GC Brief") and in Respondents' reply brief ("Reply Brief"), the material facts in this matter generally are not in dispute. Respondents do not contest that Forbes, Inc. is "owned or controlled" by Mr. Forbes and that his "Fact and Comment" commentaries are not protected by the "press exemption" in the Act and the Commission's regulations. *See* 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. §§ 100.7(b)(2) and 100.8(b)(2). The central issue in this matter is whether a corporation owned and controlled by a federal candidate that publishes a widely circulated magazine of which the candidate is editor-in-chief may donate space for the candidate to express his opinions on campaign issues in a regularly-featured commentary section of the magazine. Respondents appear to be primarily concerned with the approach used by the Commission to determine which columns written by

³ Counsel previously stated in phone conversations with staff of this Office that Respondents have no interest in pursuing or participating in preprobable cause conciliation.

⁴ The General Counsel's brief dated August 21, 1997 is incorporated herein by reference.

Mr. Forbes are "campaign-related," the costs of which are deemed to be prohibited in-kind contributions.

Respondents contend that, without an express advocacy requirement, "the Commission is left to an arbitrary selection procedure to determine which columns constitute violations of the FECA" Reply Brief at 5. The standard primarily relied upon by this Office was set forth by the Commission in Advisory Opinion 1990-5, which involved a newsletter operation owned by a candidate that was entirely under her editorial control. Even though, as in *Forbes*, the publication did not contain express advocacy and did not clearly identify the owner as a candidate, the Commission held that any edition would be deemed "campaign-related" and thus for the purpose of influencing the candidate's election if, *inter alia*, reference was made "to [the candidate's] views on public policy issues, or those of [the candidate's] opponent, or [to any] issues raised in the campaign."

Respondents' main complaint appears to be that the General Counsel "offers no analysis or rational [sic] as to why certain issues, to the exclusion of other issues, discussed in the campaign were chosen as campaign 'themes' and deemed to be 'campaign related' when they were commented upon in 'Fact and Comment.'" Reply Brief at 7. Based on the evidence, during his candidacy, Mr. Forbes discussed in his columns such issues as the flat tax, returning to a gold standard, abortion, Bosnia, federal term limits, and capital gains taxes. GC Brief at 6-7. These issues also were discussed on the campaign trail by Mr. Forbes at or subsequent to the time he formally announced

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that he was running for president on September 22, 1995, before the National Press Club in Washington, D.C. (he filed a Statement of Candidacy on the same day).

Respondents contend that Mr. Forbes's presidential announcement is the only evidence considered by the GC Brief in determining his campaign "themes." Reply Brief at 7. They claim that two of the six "themes" referred to in the GC Brief -- abortion and Bosnia -- "are not even referenced in the Forbes presidential announcement speech." *Id.* However, Respondents fail to mention that Mr. Forbes appears to have disseminated his views on abortion to the very same audience before which he had just announced his candidacy, and he criticized current U.S. foreign policy in his announcement speech just as he did in the "Fact and Comment" columns cited in the GC Brief.⁵ It is a moot distinction as to whether Mr. Forbes's statements concerning these issues were presented as part of his official announcement speech, made in response to follow-up questions, or provided in the form of press releases following the event.

⁵ Mr. Forbes made the following statement to the National Press Club on September 23, 1995: "Right now, I think we can get a consensus on banning abortions in late pregnancy, banning abortions for purposes of sex selection, banning mandatory government funding, and certainly -- being the father of five daughters -- I would support parental notification in the case of minors" (from "Election Line: The Issues," at <<http://www.electionline.com/HTEL/ipreforbquotes96/page1.cgi>> (accessed Sept. 18, 1996)).

The following comments were excerpted from Mr. Forbes's presidential announcement speech: "And they voted against Bill Clinton, . . . against his weak and aimless foreign policy. . . . We need a president who has a U.S., not a U.N. foreign policy, one who understands that the wise and judicious use of American power is now, and has been, the best hope of the world." In his columns focusing on Bosnia, Mr. Forbes makes such statements as "Only the U.S. can play a stabilizing role around the world . . ." (*Forbes*, Jan. 1, 1996 at 25) and "[T]he President . . . would put our troops in harm's way without systematic, careful consideration as to how this will help our long-term national interests" (*Forbes*, Nov. 6, 1995 at 23). Also, Mr. Forbes appears to have made the following remarks in New Hampshire on October 13, 1995, three weeks after announcing his candidacy: "But I would absolutely oppose putting troops in Bosnia. That would be a disaster and a quagmire. We can help keep that peace through judicious use of air power and vigorous diplomacy. We should have done it two years ago, four years ago. But putting our troops there will simply give us another Somalia, another Lebanon, another debacle" (from "Election Line: The Issues," at <<http://www.electionline.com/HTEL/ipreforbquotes96/page1.cgi>> (accessed Sept. 18, 1996)).

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Respondents fault this Office for not providing a more detailed factual record regarding certain issues raised by Mr. Forbes during the campaign; however, the complaint received by Respondents contains yet further examples of instances in which these issues were raised in a campaign context. For example, the complaint included a press release entitled "Forbes Issues Statement on Bosnia, November 22, 1995," containing the following statement by Mr. Forbes:

While the settlement is applaudable and one hopes lasting, it would still be a murderous mistake to send American ground forces as peacekeepers. If the settlement is real, such a presence will not be necessary. Putting American troops in Bosnia would set the stage for another Lebanon or Somalia. Even worse, this debacle may set in motion forces that could destroy NATO and form xenophobic nationalist forces in Russia. I call upon Congress and Republican Congressional leaders to fight such a deployment with every ounce of energy they have. It must be blocked.

In a similar vein, Respondents place peculiar emphasis on this Office's use of the word "theme(s)," arguing that the "minimal references" to certain issues (specifically, the gold standard and term limits) discussed in Mr. Forbes's announcement speech "causes them to fall far short, especially with no collateral evidence, of establishing them as 'themes' of [the] campaign."⁶ Reply Brief at 9. This Office did not deem it necessary to describe every single occurrence wherein Mr. Forbes or his campaign publicly referred to

⁶ The terms "[campaign] issue(s)" and "[campaign] position(s)" are used in the GC Brief more frequently than "[campaign] theme(s)," yet Respondents have chosen to refer exclusively to the latter in their Reply Brief in the apparent belief that it connotes a narrower definitional boundary than the other terms and, hence, a "campaign-related" standard too narrow to apply to the subjects discussed by Mr. Forbes in his columns. While some subjects (e.g., the "flat tax") may be appropriately labeled campaign "themes" of Mr. Forbes in the sense that they are more closely identified with him than with other candidates, all the subjects discussed in the columns and mentioned in the GC Brief are analyzed in the same manner with respect to the AO 1990-5 standard. The context of particular terminology used in the GC Brief to describe these subjects provides no rational basis for the selectively narrow characterization set forth in the Reply Brief.

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these and other campaign issues throughout the course of his six-month campaign, outside of the context of Forbes, Inc. publications. To have done so would have dramatically increased the length of the GC Brief since these issues were likely raised in most campaign speeches given by Mr. Forbes, many debates in which he participated, several press releases disseminated by his campaign, and many political advertisements paid for by the Forbes Committee. The political advertisements alone involved expenditures of millions of dollars in the first primary states. Indeed, the Reply Brief is misleading to the extent that it implies that the *only* references made by Mr. Forbes to certain issues mentioned in the GC Brief were in his announcement speech.

The announcement speech was specifically addressed because it offers the first apparent instance during the campaign in which Mr. Forbes publicly expressed his views on these issues. Further, the fact that the issues cited in the GC Brief were raised and discussed by Mr. Forbes in this particular setting tends to establish a close nexus to the campaign, such that they clearly qualify as "campaign-related" issues. In any event, the two issues that Respondents claim "cannot be considered 'themes' of the Forbes campaign" because of the "minimal references" to them in Mr. Forbes's announcement speech -- the gold standard and term limits -- were discussed in a campaign context by Mr. Forbes subsequent to that speech.⁷

⁷ For example: "Let's take [the dollar] out of the hands of the Washington politicians and return it as a fixed measure of value. Make it as good as gold again." Steve Forbes on the Stump, February 29, 1997 (<http://web-cr01.pbs.org/newshour/bb/election/forbes_3-1.html> (accessed Sept. 4, 1996)); "The attacks by Bob Dole and his allies cannot obscure this basic fact: our advertising on term limits was right and accurate. Bob Dole canceled his scheduled vote on term limits. He now promises one next Spring, conveniently after most of the presidential primaries. This is the Washington equivalent of saying the check is in the mail." *Forbes press release quoting a New Hampshire speech given on November 9, 1995* (<<http://www.electionline.com/HTEL/ipreforquotes96/page1.cgi>> (accessed Sept. 18, 1996)).

Respondents' cramped reading of the standard enunciated by the Commission in AO 1990-5 would suggest that "campaign-related" material comprises only those issues discussed repeatedly by the candidate and personally identified with him or her in such a manner that they are somehow elevated to the status of campaign "themes." Although this Office focused narrowly on public policy issues expressly raised by Mr. Forbes in a campaign context and which he similarly wrote about in his columns, the Commission actually imposed a broader restriction on the requestor in AO 1990-5. Not only were issues raised by the candidate during the campaign deemed to be "campaign-related," but the standard also encompassed the candidate's "views on public policy issues" and "those of [the candidate's] opponent," *without* direct reference to the campaign. Accordingly, the subjects cited in the GC Brief that were also commented upon by Mr. Forbes in his column easily satisfy the Commission's standard as stated in AO 1990-5.⁸

Respondents further argue that the cost of commentaries featured in another Forbes, Inc. publication -- *The Hills-Bedminster* (N.J.) *Press* -- do not constitute prohibited in-kind contributions by the corporation. Reply Brief at 10-13. These commentaries by Mr. Forbes were actually reprinted excerpts of columns that appeared in *Forbes*. The September 27, 1995 edition of *The Hills-Bedminster Press* also contained a front page story about Mr. Forbes's presidential announcement and,

⁸ The issues focused upon in the GC Brief -- the flat tax, the gold standard, abortion, Bosnia, term limits, and capital gains taxes -- are all arguably "public policy issues" under the AO 1990-5 standard. Accordingly, commentary on these issues in *Forbes, Inc.* publications would appear to sufficiently meet this standard *without* showing that such discussions also occurred within a particular campaign context. The "campaign-related" criteria in AO 1990-5 are fully set forth as follows: "(1) direct or indirect reference is made to the candidacy, campaign or qualifications for public office of [the candidate or his or her] opponent"; or (2) reference is made "to [the candidate's] views on public policy issues, or those of [the candidate's] opponent, or [to any] issues raised in the campaign"; or "(3) distribution of the newsletter is expanded . . . in any manner that . . . indicates [its] utilization as a campaign communication."

therefore, at least with respect to that edition, the candidate is clearly identified such that the costs associated with Mr. Forbes's commentary on capital gains taxes appearing on the fourth page should constitute an in-kind corporate contribution pursuant to AO 1988-22.

The Commission determined in AO 1988-22 that when statements, comments or references regarding a clearly-identified candidate appear in a publication and are coordinated with the candidate or his or her campaign, the payment for allocable costs incurred in making the communications will constitute in-kind contributions to the candidate. Respondents appear to assert that, because Mr. Forbes's commentary itself contained no references to the campaign or to Mr. Forbes as a candidate, it does not meet the standard set forth in AO 1988-22. Reply Brief at 11-12. However, the Commission included no such restriction in AO 1988-22, and thus it is inaccurate for Respondents to imply that campaign issue commentaries appearing in a particular edition of a candidate's publication should be divorced from references to the candidate or campaign appearing elsewhere in that very same edition. In any case, the columns containing campaign issue discussions by the candidate that appear in *The Hills-Bedminster Press* fall squarely within the AO 1990-5 standard, regardless of whether they also clearly identify Mr. Forbes as a candidate, since reference to the candidate is not a necessary element of that standard.⁹

⁹ While the "campaign-related" test in AO 1990-5 does contain an identification prong as one of its three criteria, see *supra* footnote 8, the test is disjunctive; i.e., a showing that *any* of the criteria are met may be sufficient to establish that a particular activity is "campaign-related." As described above in the text, the part of the test involving references to campaign issues is clearly satisfied.

Also, it should be noted that the contribution value of the single issue where Mr. Forbes is identified as a candidate constitutes a very small portion (less than .2%) of the total amount calculated in

Respondents also argue that, because the General Counsel "cites to no statute or regulation which list [sic] the criteria the Commission will consider to determine the [campaign] 'themes,' Forbes, Inc. would be forced to seek pre-clearance by the FEC for each portion of the 'Fact Comment' [sic] column if they are to be free of a fear of possible prosecution." Reply Brief at 13. Respondents add that this Office's reliance upon AO 1990-5 to rectify this problem "must fail due to the 'case by case' review called for in that opinion." *Id.* at 14.

In AO 1990-5, however, the Commission imposed no "pre-clearance" requirement upon the requestor, but merely advised her that "continued publication of the newsletter since [becoming] a candidate could potentially be used to advance [her] candidacy," and that the expenses of publishing editions containing "campaign-related content" as described earlier would "render expenses of publishing that edition a campaign expenditure." Respondents are similarly situated as the requestor in AO 1990-5 in that, even though Mr. Forbes's commentaries may have not have been inherently election-related in the years prior to his candidacy, continued publication of them in *Forbes* and *The Hills-Bedminster Press* after he became a candidate served to advance his candidacy. Respondents complain about the "vagueness and arbitrary application" of the "campaign-related" standard, see Reply Brief at 14, but they are free to request advisory opinions to address their concerns over which of Mr. Forbes's columns the Commission deems to be in-kind contributions from his corporation, just as

(footnote 9 cont.)

this matter. In fact, the contribution value derived from all of the *Hills-Bedminster Press* columns accounts for less than 1% of total contributions. See *infra* footnote 14.

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the requestor did in AO 1990-5.¹⁰ Further, it should be noted that "campaign-related" material may be carried in an incorporated publication after the editor/owner becomes a federal candidate, so long as the campaign assumes the costs for publishing such material, as the Commission observed in AO 1990-5.¹¹

The remainder of the Reply Brief essentially reiterates, albeit in greater detail, Respondents' arguments previously set forth in their responses to the Commission's reason to believe findings, which already have been addressed in the GC Brief. See Reply Brief at 18-33. First, Respondents cite several cases for the proposition that "express advocacy" is the proper standard to be applied to Mr. Forbes's columns. See Reply Brief at 18. However, those cases did not involve coordinated expenditures, which are treated as contributions rather than expenditures under the Act.¹² See *Buckley v. Valeo*, 424 U.S. 1, 46 (1976). As stated in the GC Brief, the Supreme Court and other federal courts have not applied the express advocacy requirement to contributions, as they have for independent expenditures. See GC Brief at 12. Second, Respondents renew their argument that "coordination" is applicable solely to the type of activities specified at 11 C.F.R. §§ 114.3 and 114.4, rather than to the activities occurring

¹⁰ Because the Act does not require Respondents to submit written material for pre-publication approval by the Commission, their claim of an unconstitutional "prior restraint," including their references to the prominent decisions on the topic, is misplaced. See Reply Brief at 16-17.

¹¹ The Commission subsequently permitted the requestor in AO 1990-5 to continue publishing her newsletter as a sole proprietorship instead of in the corporate form, informing her that the funds expended would then be considered personal in nature and reported by her committee as in-kind contributions from her. See AO 1990-9.

¹² One of the cases cited in the Reply Brief -- *Clifton v. FEC*, 927 F. Supp. 493 (D.Me. 1996), 114 F.3d 1309 (1st Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3355 (U.S. Nov. 6, 1997) (No. 97-786) -- discussed coordination, but only within the limited context of the Commission's voter guide regulations.

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in this matter. See Reply Brief at 28-29. This Office noted, however, that those regulations merely implement certain statutory and constitutionally mandated exceptions to the general prohibition against corporate and union expenditures in connection with federal elections. See GC Brief at 14. They should not be construed as comprising a "limited universe" of activities that may involve coordination between a corporation and a candidate or campaign, as suggested by Respondents. See Reply Brief at 29. Third, Respondents claim that this Office ignores or fails to rebut the advisory opinions cited in their earlier responses. As noted in the GC Brief, however, those advisory opinions did not involve owners of incorporated publications who then became federal candidates.¹³ Finally, Respondents renew their assertion that Mr. Forbes was not seeking election in New Jersey, which they argue is "obviously relevant since the 'Fact and Comment' columns in the Hills-Bedminster newspapers could not impact on an election he was not seeking." Reply Brief at 32. However, as previously noted, Mr. Forbes became a presidential candidate under the Act no later than September 22, 1995 (based on receipts and expenditures by the Committee -- see 2 U.S.C. § 431(2)), after which time the referenced columns were published. See GC Brief at 9, n.7.

In summary, Respondents' Reply Brief provides no new evidence or persuasive arguments to warrant a finding of no probable cause to believe. Based on a review of all "campaign-related" passages in "Fact and Comment" columns appearing in Forbes, Inc.

¹³ Respondents discuss in some detail AO 1992-6, which involved a candidate who was to be paid an honorarium and related travel expenses by a university for coming to speak about affirmative action before a university audience. Reply Brief at 31. The Commission concluded that such payments did not constitute a contribution or expenditure under the Act and regulations, noting that the candidate did not control the event or who attended the event. The Commission also included a discussion of AO 1990-5, observing that the candidate in that situation, *inter alia*, controlled the publication at issue.

publications during Mr. Forbes's candidacy, Forbes, Inc. made, and the Forbes Committee accepted, not less than \$94,900 in prohibited in-kind contributions. This is a conservative figure based on the rates that a general advertiser would pay for the same space occupied by these passages in *Forbes* and *The Bedminster-Hills Press*.¹⁴ The Committee has not disclosed any such contributions in its reports filed with the Commission.

Based on the foregoing, this Office recommends that the Commission find probable cause to believe that Forbes, Inc. made in-kind corporate contributions to the Forbes Committee in violation of 2 U.S.C. § 441b(a), and that the Forbes Committee violated 2 U.S.C. §§ 441b(a) and 434(b)(2)(A) by knowingly accepting them and by failing to report them. Because Mr. Forbes was personally involved in creating and disseminating the commentaries that constituted the contributions, this Office also recommends that the Commission find probable cause to believe that Mr. Forbes, personally and as an officer of Forbes, Inc., violated 2 U.S.C. § 441b(a) by knowingly accepting and by consenting to the contributions, respectively.

¹⁴ The pages or column-inches of campaign-related material were multiplied by the advertising rates of the publications as follows:

<i>Forbes</i> :	2.52 pages	x	\$37,480/page	=	\$94,450
<i>Hills-Bedminster Press</i> :	55 inches	x	\$9.53/inch	=	\$ 524
	TOTAL CONTRIBUTIONS			=	\$94,974

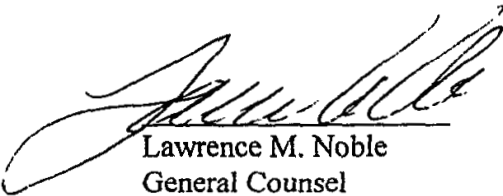
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IV. RECOMMENDATIONS

1. Find probable cause to believe that Forbes, Inc. violated 2 U.S.C. § 441b(a).
2. Find probable cause to believe that Forbes for President, Inc. and William A. Dal Col, as treasurer, violated 2 U.S.C. §§ 441b(a) and 434(b)(2)(A).
3. Find probable cause to believe that Malcolm S. "Steve" Forbes, Jr. violated 2 U.S.C. § 441b(a).
4. Approve the attached joint conciliation agreement and appropriate letter.

Date

1/15/98


Lawrence M. Noble
General Counsel

Attachment:

Proposed Joint Conciliation Agreement

Staff Assigned: Thomas J. Andersen


99-04-391-3304



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS/LISA DAVIS 
COMMISSION SECRETARY

DATE: JANUARY 23, 1998

SUBJECT: MUR 4305 - General Counsel's Report dated January 15, 1998.

The above-captioned document was circulated to the Commission
on Friday, January 16, 1998.

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Aikens	<u>XXX</u>
Commissioner Elliott	<u>XXX FOR THE RECORD</u>
Commissioner McDonald	—
Commissioner McGarry	—
Commissioner Thomas	—

This matter will be placed on the meeting agenda for

Tuesday, February 10, 1998.

Please notify us who will represent your Division before the Commission on this
matter.

99-04-391-3305



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS/LISA DAVIS
COMMISSION SECRETARY



DATE: JANUARY 22, 1998

SUBJECT: MUR 4305 - General Counsel's Report dated January 15, 1998.

The above-captioned document was circulated to the Commission
on Friday, January 16, 1998.

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Aikens	—
Commissioner Elliott	<u>XXX FOR THE RECORD</u>
Commissioner McDonald	—
Commissioner McGarry	—
Commissioner Thomas	—

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel *WCS*

DATE: January 15, 1998

SUBJECT: MUR 4305- General Counsel's Report

The attached is submitted as an Agenda document for the
Commission Meeting of _____

Open Session _____

Closed Session _____

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MUR

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AUDIT MATTERS

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REGULATIONS

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